Attorneys General and Chief Environmental Enforcement Officers for the States of New Hampshire, Connecticut, Delaware, Maine, Massachusetts, New Mexico, New York, New Jersey, Pennsylvania and Vermont

April 1, 2004

VIA FACSIMILE AND FIRST CLASS MAIL

Honorable Michael Leavitt, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code 3213A
Washington, DC 20460

EPA Docket Center (Air Docket)
U.S. EPA West (6102T)
Room B-108
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Request for Withdrawal of EPA's Mercury Proposal
Docket Nos. OAR-2002-0056 and A-92-55

Dear Administrator Leavitt:

As chief legal and environmental enforcement officers for our states, we are very concerned about the direction that EPA has taken in its rulemaking proposals regarding mercury emissions from power plants. While we plan to submit detailed comments on the proposals at the appropriate time, we ask that you seriously consider this preliminary request on the course that the rulemaking should follow.

In our view, the mercury proposals do not meet the minimum requirements of the Clean Air Act or the Administrative Procedures Act and would not withstand legal challenge. We regretfully urge you to withdraw the proposals immediately and, after conducting further technical analyses, notice and public comment, to re-propose a supportable and integrated rulemaking designed to achieve meaningful and timely reductions in mercury emissions from power plants.

As you know, mercury is listed as a "hazardous air pollutant" under section 112(b) of the Clean Air Act. In December 2000, EPA found it "necessary and appropriate" to regulate utilities under section 112, which required maximum achievable emission reductions at each plant. EPA's recent proposal to back away from the Clean Air Act's technology-forcing

approach and to replace it with a "preferred" cap and trade approach ignores the Act's requirements and good science, both of which demand stringent plant-specific controls. A meaningful standard is needed not only to reduce the total amount of mercury in our states, but also to address the problem of local "hot spots" of mercury deposited nearby individual power plants.

Mercury is highly toxic and is linked to many health effects, including neurological and developmental problems and endocrine disruption in humans, fish and wildlife. Once mercury enters the environment, it can remain as an active toxin for over 10,000 years. Recent studies indicate that the problem is worse than previously thought, in terms of both the amount of mercury contamination in the environment and its impact on human health. New estimates for the Northeast show that 40% of lakes in New Hampshire and Vermont contain mercury levels in excess of even the least stringent EPA standard. The federal Food and Drug Administration and EPA recently released new health advisories on limiting human consumption of fish and shellfish. EPA's own scientists just released a study finding that a disturbingly large number of infants born in our country have unsafe levels of mercury in their blood.

These problems indicate the need for swift and effective regulatory action to limit mercury emissions from the key sources, coal burning power plants. EPA's preferred cap and trade approach would allow many such plants to escape regulation and fails to address the problem of "hot spots" of mercury near these plants. In addition, it would not necessarily address the problem of interstate transport of mercury emissions, which is a significant problem for each of our states. Even if EPA could adopt this approach under existing Clean Air Act authorities, and we do not think it can, EPA's proposed cap is far too permissive and would do little to reduce mercury emissions for decades to come.

Although the Clean Air Act requires a plant-specific standard based upon "maximum achievable control technology" ("MACT" standard) to be at the core of any proposal, we are concerned that EPA has based the proposed MACT standard upon faulty assumptions. For example, EPA has failed to account for demonstrated control technologies like activated carbon injection and has assumed that mercury emissions from power plants can be reduced only as a "co-benefit" to installation of emission controls for other pollutants. EPA has also ignored requests from state representatives on EPA's own advisory committee workgroup, who have asked EPA to run the "Integrated Planning Model" ("IPM") with demonstrated technology assumptions in place.

While we commend your recent statements on the need for further EPA analyses before this rulemaking can be finalized, we are concerned that the additional analyses will be generated merely to "prop up" a legally defective rulemaking that relies on a national cap and trade program and a watered-down MACT standard based on "co-benefits" from other regulatory programs. EPA should go well beyond the effort to correct analytical errors on the cap and trade program. EPA should generate a complete and legally defensible record to

support a meaningful proposal to reduce mercury emissions from power plants as quickly as feasible. This should include, at a minimum, correction to the proposed MACT "floor" and development and review of additional IPM data with appropriate assumptions, as requested by states and other members of EPA's advisory committee workgroup.

In addition, the states and other interested parties should be given a full opportunity to analyze and comment upon any new analyses generated by EPA. This opportunity should be provided in the context of the entire rulemaking and not in the piecemeal fashion that characterizes this rulemaking to date. Your agency's plan to proceed with the current proposals, despite recent admissions of technical error, creates a legal and practical impediment to the states' ability to submit meaningful comment. EPA has already published two "provisional" proposals based upon a number of alternative scenarios. The comment period on these proposals will expire at the end of April 2004, despite our requests for further extension and opportunity to submit state-specific modeling analyses. EPA's recent disclosures of technical error and plans to produce additional analyses further complicate what is already a disjointed rulemaking process. The states are entitled to full and meaningful participation in this rulemaking, as we will be forced to address its shortcomings.

Therefore, we urge you to withdraw the entire proposal and to re-propose an integrated rulemaking package after producing a complete record that is based on clear legal authority and sound technical information. We also urge you to provide adequate opportunity to comment on the entire proposal, including all new data and analyses, before issuing a final rule.

If you decide, instead, to move forward with the existing proposals, at the very least you should suspend the comment period that is about to expire. After completion of the new EPA analyses that you and the advisory committee have requested, you should, at a minimum, issue a supplemental notice of proposed rulemaking. States and other interested parties should then be given an opportunity to review the new analyses and to comment on the entire proposal in the context of this new information. Without this additional opportunity to comment on the entire proposal, states and others would not be afforded adequate due process.

While we understand that EPA is facing a December 2004 deadline under a consent decree for issuing a final mercury rule, we note that the party to that decree has already asked you to withdraw certain portions of the proposal. See March 21, 2004 letter from Jon P. Devine, Jr., Senior Attorney, Natural Resources Defense Council, to Michael Leavitt, EPA Administrator. We also note an announcement that more than three dozen U.S. Senators will ask you to withdraw the entire rulemaking package. See Press Release of Senator John Sununu, March 25, 2004. In light of these requests, it would be appropriate for EPA to take whatever steps are necessary to comply with all of its legal obligations.

We would appreciate your prompt response to this request.

Very truly yours,

PETER W. HEED, ATTORNEY GENERAL
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AND ON BEHALF OF

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